



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 20, 2017

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2017-21509

Dear Ms. Parker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 676578.

The Texas Department of Transportation (the "department") received a request for information pertaining to eight specified solicitations.¹ You claim the information submitted as Exhibit B is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although you take no position as to whether the remaining information, which you have submitted as Exhibit C, is excepted from disclosure, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified these third parties of the request for information and of each company's right to submit arguments to this office as to why the submitted information should not be

¹You state the department received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

released.² *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Aguirre, AIA, CEC, CCG, CP&Y, and Lupher. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note Aguirre and Lupher seek to withhold information not submitted to this office by the department. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the department, this ruling does not address this information and is limited to the information submitted as responsive by the department.

Next, you state some of the requested information was the subject of previous requests for information, and that the department is relying on prior rulings with respect to the requested information previously ruled upon by this office. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We note, as a result of these prior requests for information, this office issued Open Records Letter Nos. 2016-15635 (2016), 2016-20130 (2016), 2016-25808 (2016), 2016-26443 (2016), 2016-26903 (2016), 2017-03918 (2017), 2017-07802 (2017), 2017-11522 (2017), 2017-13250 (2017), and 2017-14601 (2017). Further, you state Exhibit B consists of the responsive information for which the department has not received a previous determination. However, we note some of the submitted information may have been previously released. Thus, we understand some of the third parties now seek to

²The department notified the following third parties: Aguirre & Fileds, L.P. ("Aguirre"); AIA Engineers, Ltd. ("AIA"); Civil Consulting Group, PLLC ("CCG"); Don Durden, Inc. d/b/a Civil Engineering Consultants ("CEC"); Civil Design Services, Inc. d/b/a CDS Muery; Civil Systems Engineering, Inc.; CivilCorp, LLC; CivilTech Engineering, Inc.; Cobb, Fendley & Associates, Inc.; CP&Y, Inc. ("CP&Y"); Dannenbaum Engineering Corporation; Gunda Corporation, LLC; H.A. Kuehlem Survey Company; IEA Inc.; Jacobs Engineering Group, Inc.; Jones & Carter, Inc.; Kimley-Horn and Associates, Inc.; Landesign Services, Inc.; Landtech, Inc.; Lina T. Ramey and Associates, Inc.; Lupher, LLC ("Lupher"); Maverick Engineering, Inc.; McGray & McGray Land Surveyors, Inc.; McKim & Creed, Inc.; Pierce, Goodwin, Alexander & Linville, Inc.; Poznecki-Camarillo, Inc.; Surveying and Mapping, LLC; Survtex, LLC; TranSystems Corporation d/b/a Transystems Corporation Consultants; and Walter P. Moore and Associates, Inc.

³We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

withhold some of their information under section 552.104 of the Government Code that may have been previously ordered released. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the information at issue was previously released pursuant to the prior rulings, the department may not now withhold the third parties' previously released information under section 552.104. We also note some third parties now seek to withhold some of their information which may have been previously ordered released in the prior rulings under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address the claims under section 552.110 for any previously released information. Furthermore, except with regard to the third parties' claims under section 552.110, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, except with regard to the third parties' claims under section 552.110, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department may continue to rely on Open Records Letter Nos. 2016-15635 (2016), 2016-20130 (2016), 2016-25808 (2016), 2016-26443 (2016), 2016-26903 (2016), 2017-03918 (2017), 2017-07802 (2017), 2017-11522 (2017), 2017-13250 (2017), and 2017-14601 (2017) as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673. However, we will address the third parties' arguments under section 552.104 against disclosure of the information not subject to the prior rulings.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As noted above, as of the date of this letter we have only received comments from Aguirre, AIA, CEC, CCG, CP&Y, and Luper. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing*

Co. v. Paxton, 466 S.W.3d 831 (Tex. 2015). You represent Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, you state the department “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the information in Exhibit B would “undercut [the department]’s negotiating position with respect to future procurements for such contracts.” After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibit B would give advantage to a competitor or bidder. Thus, the department may withhold Exhibit B under section 552.104(a) of the Government Code.⁴

Aguirre, AIA, CCG, CEC, CP&Y, and Lupher assert their information at issue in Exhibit C is protected under section 552.104 of the Government Code. As noted above, section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Aguirre, AIA, CEC, CCG, CP&Y, and Lupher state they have competitors. In addition, Aguirre, AIA, CEC, CCG, CP&Y, and Lupher state the information at issue, if released, would give competitors an advantage in future competitive bidding situations. After review of the information at issue and consideration of the arguments, we find Aguirre, AIA, CEC, CCG, CP&Y, and Lupher have established the release of the information at issue in Exhibit C, which we marked, would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not subject to the prior rulings, we conclude the department may withhold the information we marked under section 552.104(a) of the Government Code.⁵

CEC also claims its information at issue is excepted under section 552.110(a) of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁶ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

CEC asserts its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude CEC has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find CEC has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted

⁶The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

under section 552.110). Therefore, CEC's information at issue may not be withheld under section 552.110(a) of the Government Code.

In summary, the department may continue to rely on the prior rulings with respect to the requested information previously ruled upon by this office as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B and, to the extent the information at issue was not previously ordered released in the prior rulings, the department may withhold the information we marked in Exhibit C under section 552.104(a) of the Government Code. The department must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 676578

Enc. Submitted documents

c: Requestor
(w/o enclosures)

30 Third Parties
(w/o enclosures)